Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DOUGLAS MILLER, Petitioner
vs.

COUNTY OF SANTA CRUZ, SHERIFF AL NOREN, OFFICER MARILYN WEAVER, OFFICER TERRY MOORE, Respondents

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a plaintiff must exhaust state administrative remedies as a prerequisite to the filing a complaint under 42 U.S.C. Section 1983 in light of the holding in Patsy v. Board of Regents of Florida, 457 U.S. 496, 74 L.Ed.2d 172, 102 S. Ct. 2557 (1982).

Whether a state administrative agency consisting entirely of lay persons may issue binding pronouncements in the area of federal or constitutional law.

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COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, DOUGLAS MILLER, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A and B, *infra*,) is reported at 39 F.3d. 1030. The order denying rehearing is unreported (Appendix C, *infra*). The opinion of the district court is reported at 796 F.Supp. 1316.

JURISDICTION

The court of appeals filed its opinion on November 8, 1994. An amended opinion was filed December 27, 1994. An order denying a petition for rehearing was entered January 5, 1995. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. Section 1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT

Petitioner, DOUGLAS MILLER, was employed by the Respondent, COUNTY OF SANTA CRUZ,

beginning in 1980 as a detention officer. From 1980 to 1985, Petitioner's record was spotless and his evaluations were excellent. In 1985, Petitioner's supervisor, Respondent TERRY MOORE, became extremely angry with Petitioner over the tape recording of an interrogation and threatened to cause Petitioner's termination. From that point forward, Petitioner received one disciplinary action after another. Respondent TERRY MOORE was involved directly or indirectly with every disciplinary action.

Petitioner contested his eventual dismissal before the County Civil Service Commission. At no time did Petitioner raise any claim before the Civil Service Commission under 42 U.S.C. Section 1983; nor did that body have any legal authority to hear or grant relief for any violation of Section 1983. Petitioner did not seek review of the Commission's decision to uphold the termination.

Petitioner filed suit in Federal District Court under Section 1983. Respondent filed three Motions seeking dismissal of the Complaint, all of which were denied by U.S. District Judge William Ingram. Upon consent to hearing before Magistrate Judge Edward Infante, Respondents filed yet another motion to dismiss on res judicata and collateral estoppel grounds. The motion was granted.

On appeal, the Ninth Circuit held that Petitioner was precluded from filing a Section 1983 claim because he had failed to exhaust his administrative remedies.

The United States Supreme Court in Patsy v. Board of Regents of Florida, 457 U.S. 496, 74 L.Ed.2d 172, 102 S. Ct. 2557 (1982), and the Ninth Circuit in Sisk v. CSO Branch, 974 F.2d 116, (9th Cir. 1992), have both held that exhaustion of administrative remedies is not a predicate to filing a claim under Section 1983. Here, the Ninth Circuit has ruled that failure to exhaust state administrative remedies precludes Petitioner's filing

of an action under Section 1983. This ruling contradicts Patsy, and Sisk, both cases plainly holding that exhaustion is not a prerequisite.

The Ninth Circuit admitted that its decision also contradicts another decision in the Third Circuit. The Slip Opinion at page 15799 states as follows:

> "Nor do we agree with Miller that the administrative decision is not binding because the Commission need not be constituted of lawyers. We are aware that our holding on this matter conflicts with that of the Third Circuit in *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3rd Circ. 1993)."

The Ninth and Third Circuits have, thus, issued directly contradicting opinions. The Ninth Circuit, at Slip Opinion at page 15800, stated further as follows:

> "We decline to adopt the conclusions reached in *Edmundson*. First of all, we will not follow a decision which conflicts with those of our own circuit."

In sum, conflicting decisions exist in the Ninth and Third Circuits.

REASONS FOR GRANTING THE PETITION

Justice Scalia has observed that "[nothing] is more wasteful than litigation about where to litigate." (Bowen v. Massachusetts, 487 U.S. at 930 (dissenting opinion); see also Christensen v. Colt Industries Operating Corp., 486 U.S. 800, 818-819 (1988). The Ninth Circuit opinion for which this writ is sought results in similar confusion.

Administrative appeals are a fundamental mechanism to resolve employment discipline and termination disputes in the public sector avoiding expensive litigation. Since the filing of the opinion herein, it is now uncertain whether a public employee should pursue an administrative appeal or proceed directly to federal court to avoid preclusion of a Section 1983 claim. As a consequence, it is less desirable, perhaps even malpractice, to pursue an administrative appeal. The better, safer approach is to avoid administrative remedy and proceed to federal court directly. This result is

neither desirable nor beneficial to the judicial system. Public employees should be encouraged to use administrative remedies. Here, the opinion of the Ninth Circuit discourages public employees from appealing administrative remedies. The issues herein have potential impact in every circuit.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: March 31, 1995

RESPECTFULLY SUBMITTED,

JACKSON, ABDALAH & RODRIGUEZ

By:

RICHARD K. ABDALAH
Attorney for Petitioner

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DOUGLAS MILLER, *Plaintiff-Appellant,* v. COUNTY OF SANTA CRUZ, et al., *Defendants-Appellees.*	No. 92-16694 D.C. No. CV-89-20131- WAI(EAI) OPINION

Appeal from the United States District Court
for the Northern District of California
Edward A. Infante, Magistrate Judge, Presiding

Argued and Submitted
March 14, 1994—San Francisco, California

Filed November 8, 1994

Before: Dorothy W. Nelson and Robert R. Beezer, Circuit Judges and J. Spencer Letts,* District Judge.

Opinion by Judge Beezer

SUMMARY

Individual Rights/Civil Rights/Administrative Law

The court of appeals affirmed a district court judgment. The court held that a county civil service commission's unreviewed findings relating to a dismissal from employment

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*The Honorable J. Spencer Letts, United States District Judge for the Central District of California, sitting by designation.

were entitled to preclusive effect in the dismissed employee's subsequent civil rights action in the district court.

Appellant Douglas Miller was employed by the Sheriff's Department for appellee the County of Santa Cruz. His employment was terminated after four disciplinary actions. Miller contested his dismissal before the County Civil Service Commission. The Commission held a public evidentiary hearing at which Miller was represented by counsel and was permitted to present oral and documentary evidence and to call witnesses. The Commission sustained his dismissal, issuing written findings and conclusions.

Miller was notified of his right to seek judicial review in the Superior Court of California, but he elected not to do so. Instead, he filed a civil rights action, under 42 U.S.C. § 1983, in the district court. The district court granted summary judgment to the County and the individually named defendants. The court concluded that the doctrines of res judicata and collateral estoppel barred Miller's § 1983 suit because he failed to seek review of the adverse decision of the Commission. Miller appealed.

[1] Title 28 U.S.C. § 1738 requires the court of appeals to give the same preclusive effect to state court judgments as they would be given in the state in which they were rendered. [2] Federal courts give preclusive effect to the findings of state administrative tribunals in subsequent actions under § 1983; [3] the Ninth Circuit has held that such federal common law rules of preclusion extend to state administrative adjudications of legal as well as factual issues, even if unreviewed, so long as the state proceeding satisfies certain fairness requirements.

[4] California would have given preclusive effect to the judgment of the Commission had Miller brought his § 1983 action in state court. In *Swartzendruber v. City of San Diego*, the California court of appeal gave preclusive effect to the

unreviewed findings of the City Civil Service Commission under facts similar to the facts in this case. [5] The *Swartzendruber* court held that, unless state court review of the administrative findings is sought, an administrative hearing adjudication will bind the parties on issues litigated; the court's conclusion rested on both collateral estoppel and res judicata grounds.

[6] *Swartzendruber* dictated the preclusive effect of the Commission in this case. Miller, in his complaint in the district court, restated his wrongful termination contentions in constitutional terms. Whether characterized as the "issue" of the right to continued employment or as the "claim" of a civil rights violation, the unreviewed finding of the administrative tribunal precluded further litigation of Miller's contentions.

[7] *Swartzendruber* neither overruled past precedent nor decided an issue of first impression whose resolution was not clearly foreshadowed. Rather, the case was completely in line with the logical progression of California law in the area of administrative preclusion. [8] Thus, *Swartzendruber* applies retroactively.

[9] Miller was incorrect in asserting that the administrative decision in this case was not binding because the Commission need not be constituted of lawyers. [10] Where, as in this case, the agency adjudication meets the requirements of due process and de novo judicial review is available, concerns of comity and finality counsel against denying preclusive effect.

[11] California has made it clear that a discharged civil servant who *elects* an administrative forum for review of his or her termination must succeed in overturning that administrative decision through the judicial mandamus review procedure prior to filing a suit for damages on claims arising out of the termination. So long as certain minimum fairness criteria are met, the court of appeals will defer to the considered judgment of the courts of California that an unreviewed agency

determination is equivalent to a state court judgment entitled to res judicata and collateral estoppel effect.

COUNSEL

Richard K. Abdalah, Jackson, Abdalah & Rodriguez, Cupertino, California, for the plaintiff-appellant.

Mark G. Bonino and Megan A. Smith, Ropers, Majeski, Kohn, Bently, Wagner & Kane, Redwood City, California, for the defendants-appellees.

OPINION

BEEZER, Circuit Judge:

Douglas Miller appeals the district court's grant of summary judgment to the County of Santa Cruz and the individually named defendants. The district court concluded that the doctrines of res judicata and collateral estoppel barred Miller's federal suit under 42 U.S.C. § 1983 because he failed to seek review of the adverse decision of the Santa Cruz County Civil Service Commission. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

Miller was employed by the Santa Cruz County Sheriff's Department from December 1980 until February 1988. He was terminated after four disciplinary actions, the last of which related to an alleged failure to report an overpayment of wages. Miller contested his dismissal before the Santa Cruz County Civil Service Commission. The Commission held a public evidentiary hearing at which Miller was represented by counsel and was permitted to present oral and documentary

evidence and to call witnesses. The Commission sustained his dismissal, issuing written findings and conclusions.

Miller was notified of his right to seek judicial review in the Superior Court of California. Cal. Code Civ. P. §§ 1094.5 and 1094.6. He elected not to do so. Instead he filed this suit under 42 U.S.C. § 1983 in the United States District Court. Magistrate Judge Infante, sitting by consent of the parties, granted the County's motion for summary judgment on res judicata and collateral estoppel grounds.[1]

II

The question presented is whether unreviewed findings of a state administrative tribunal are entitled to preclusive effect in a subsequent § 1983 action in federal court. We review de novo a grant of summary judgment. *Maffei v. Northern Ins. Co.*, 12 F.3d 892, 895 (9th Cir. 1993). We review de novo the district court's determination that res judicata and collateral estoppel are available. *Guild Wineries and Distilleries v. Whitehall Co.*, 853 F.2d 755, 758 (9th Cir. 1988); *Plaine v. McCabe*, 797 F.2d 713, 718 (9th Cir. 1986). If we determine that collateral estoppel is available, we review for abuse of discretion the district court's decision to accord preclusion to the agency's decision. *Plaine*, 797 F.2d at 718.

[1]We reject Miller's contention that summary judgment was improper because the magistrate judge implicitly modified the pretrial order by allowing defendants to file the motion. A magistrate before whom the parties have consented to appear has the same power to issue or modify pretrial orders as a district court judge, and that determination can be set aside only if clearly erroneous and contrary to law. 28 U.S.C. § 636(b)(1)(A). The magistrate judge's decision was neither clearly erroneous nor contrary to law. Moreover, Miller did not object to the magistrate judge's decision to allow defendants to file the motion, nor did he object in his opposition to summary judgment. He suffered no prejudice.

A

[1] Title 28 U.S.C. § 1738 requires that we give the same preclusive effect to state court judgments as they would be given in the state in which they were rendered. *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380 (1985).

[2] Section 1738 does not govern cases involving unreviewed decisions of a state administrative hearing board or commission. *University of Tennessee v. Elliot*, 478 U.S. 788, 794 (1986). Nonetheless, as a matter of federal common law, federal courts give preclusive effect to the findings of state administrative tribunals in subsequent actions under § 1983. *Id.* at 797-99.

[3] *Elliot* requires us to give preclusive effect, at a minimum, to the factfinding of state administrative tribunals. We have gone further, however, and held that "the federal common law rules of preclusion described in *Elliot* extend to state administrative adjudications of legal as well as factual issues, even if unreviewed, so long as the state proceeding satisfies the requirements of fairness outlined in [*United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966)]." *Guild Wineries*, 853 F.2d at 758. The fairness requirements of *Utah Construction* are: (1) that the administrative agency act in a judicial capacity, (2) that the agency resolve disputed issues of fact properly before it, and (3) that the parties have an adequate opportunity to litigate. 384 U.S. at 422.

Our reasons for according preclusive effect to unreviewed agency determinations are outlined in detail in *Plaine*, 797 F.2d at 718-721. *Plaine* involved a decision by the California Corporations Commissioner that a merger price was fair. The plaintiff could have, but did not, seek review of the decision in state court. Rather, she brought an action in federal court asserting that defendants violated section 14(e) of the Securities and Exchange Act of 1934. We concluded that the com-

missioner's unreviewed fairness determination was entitled to preclusive effect. *Id.* at 721. We explained that:

> The Supreme Court has held that administrative proceedings may be given preclusive effect accorded to a court "[w]hen an administrative agency is acting *in a judicial capacity* and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate."

Id. (emphasis in original) (quoting *Utah Construction*, 384 U.S. at 422). We reasoned, therefore, that when an administrative proceeding meets the *Utah Construction* requirements, "it may rise to the level of a 'judicial proceeding' entitled to preclusive effect by section 1738." *Id.* at 719.

The threshold inquiry, we held, is whether a state administrative proceeding was conducted with sufficient safeguards "to be equated with a state court judgment." *Id.* This requires careful review of the administrative record "to ensure that, at a minimum, it meets the state's own criteria necessary to require a court of that state to give preclusive effect to the state agency's decisions." *Id.* We also noted that although a federal court should ordinarily give preclusive effect when the state court would do so, "there may be occasions where a state court would give preclusive effect to an administrative decision that failed to meet the minimum criteria set down in *Utah Construction*."[2] *Id.* at 719, n.13. However, we determined that there were no special circumstances requiring us to look beyond the state's preclusion law, because California had already adopted the *Utah Construction* standard. *Id.* at 719-20 & n.13.

[2]We determined, for example, in *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1283-84 (9th Cir. 1986) that an informally administered unemployment benefits hearing did not provide plaintiff with an adequate opportunity to litigate factual issues related to an age discrimination claim. We therefore declined to afford preclusive effect to the decision, regardless of whether the state court would have done so.

If *Plaine* left any doubt as to the preclusive effect we will give to unreviewed state agency determinations in cases such as Miller's, it was eliminated in *Eilrich v. Remas*, 839 F.2d 630 (9th Cir. 1988), *cert. denied*, 488 U.S. 819 (1988). Eilrich was a municipal police officer discharged after making certain public statements. There, we reiterated our holding in *Plaine* that the only question, in light of California's incorporation of the *Utah Construction* standard, was whether the administrative hearing met the requirements of California law such that a California court would have accorded the determination preclusive effect. *Id.* at 633. We also reiterated that because an adequate opportunity for de novo judicial review was available under California law, Eilrich could not " 'obstruct the preclusive use of the state administrative decision simply by foregoing [the] right to appeal.' " *Id.* at 632 (quoting *Plaine*, 797 F.2d at 719 n.12); *see also Guild Wineries*, 853 F.2d at 761-62 ("alleged faulty reasoning must be pursued on direct appeal and does not justify denying claim preclusive effect").[3]

B

[4] There is no genuine dispute that California would give preclusive effect to the judgment of the Civil Service Commission had Miller brought his § 1983 action in state court. In *Swartzendruber v. City of San Diego*, 3 Cal. App. 4th 896, 5 Cal. Rptr. 2d 64, 71 (1992), the court gave preclusive effect to the unreviewed findings of the City Civil Service Commission. The facts are remarkably similar to the facts here. Swart-

[3]Miller cites *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982), and *Sisk v. CSO Branch*, 974 F.2d 116 (9th Cir. 1992), for the proposition that he is not required to exhaust administrative remedies prior to filing suit under § 1983. These decisions are inapposite. Nothing prevented Miller, *prior to* his appeal to the Civil Service Commission, from filing suit in either state or federal court under § 1983. No exhaustion requirement has been imposed on Miller. It is Miller's election to pursue his claim initially in an administrative forum, and to forego his right to seek judicial review in state court, which requires us to determine whether that decision is binding on all that was, or could have been, determined there.

zendruber was terminated for not obeying a direct order to appear for work in a uniform. The Commission upheld her termination, and she did not seek review under §§ 1094.5 and 1094.6. She then sued in state superior court, alleging, in part, that her civil rights had been violated.

[5] The *Swartzendruber* court held that, unless state court review of the administrative findings is sought, "an administrative hearing adjudication binds the parties on the issues litigated." *Id.* The court's ultimate conclusion rests on both collateral estoppel and res judicata grounds.

To determine whether the "issue" of Swartzendruber's civil rights had been determined, the court examined the scope of the cause of action "to determine if it encompasses the same primary right that was at stake in the Commission proceeding." *Id.* at 71. The court concluded that Swartzendruber's allegations that her federal civil rights had been violated merely restated her cause of action for wrongful termination in constitutional terms. The same primary right, the right to continued employment, was at stake in both actions. Because the issue of her right to employment had already been adjudicated, Swartzendruber was collaterally estopped from relitigating the issue of her termination in the guise of a § 1983 action alleging violations of her civil rights.

The court also applied principles of res judicata to Swartzendruber's "claim" that her civil rights had been violated. It held that Swartzendruber's failure to "interpose before the Commission any defense to the charge of insubordination, including defenses that the City's actions violated her civil rights," was fatal to her § 1983 claim. The court quoted the following language of *Takahashi v. Board of Education*, 202 Cal. App. 3d 1464, 249 Cal. Rptr. 578, 591 (1988), *cert. denied*, 490 U.S. 1011 (1989):

> There can be no justification for plaintiff's position that she should be permitted to fail to assert at the

> administrative hearing constitutional and civil rights violations as reasons that made her termination wrongful, fail to prevail on the writ without attempting to urge or to bring before the court those reasons, and then be allowed to recover damages in this consolidated action that resulted from termination of her employment alleged to be wrongful based on those same reasons.

Swartzendruber, 5 Cal. Rptr. 2d at 72.

[6] *Swartzendruber* dictates the preclusive effect of the civil service commission in this case. Miller, in his complaint in district court, restates his wrongful termination contentions in constitutional terms. Whether characterized as the "issue" of the right to continued employment or as the "claim" of a civil rights violation, the unreviewed finding of the administrative tribunal precludes further litigation of Miller's contentions.

III

Miller interposes various objections to the application of *Swartzendruber* to his claim. First, he argues that *Swartzendruber* should not be applied retroactively. He further argues that, even if *Swartzendruber* may be applied retroactively, it does not apply to the facts of this case because certain procedural safeguards were not present and because the Commission is not composed of lawyers. We reject these arguments.

A

To determine whether a decision applies retroactively, we consider three factors: (1) whether the decision establishes a new principle of law, either by overruling clear past precedent on which the litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshad-

owed, (2) whether, considering the prior history of the rule and its purpose and effect, retrospective application will further retard its operation, and (3) whether retroactive applications will produce substantial inequitable results. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971). We agree with the district court that consideration of these factors leads to the conclusion that *Swartzendruber* should be applied retroactively.

[7] First, *Swartzendruber* neither overrules past precedent nor decides an issue of first impression whose resolution was not clearly foreshadowed. Rather, *Swartzendruber* is completely in line with the logical progression of California law in the area of administrative preclusion.

As early as 1951, the California Supreme Court established that the writ of mandamus pursuant to § 1094.5 is the proper procedure for gaining review of an administrative decision. *Boren v. State Personnel Board*, 37 Cal. 2d 634, 234 P.2d 981, 983 (1951). Then, in *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 131 Cal. Rptr. 90, 101 (1976), the court held that a discharged public hospital employee could not attempt to enforce the same right in a tort action that she had litigated in an administrative forum without first pursuing the mandamus remedy. The court stated:

> Although a quasi-judicial decision reached by a tribunal of a private association may not be entitled to the same measure of respect as a similar decision of a duly constituted public agency, we believe that so long as such a quasi-judicial decision is not set aside through appropriate review procedures the decision has the effect of establishing the propriety of the [agency's] action.

Id. The court was insistent that an aggrieved party be precluded from circumventing the established avenue of mandamus review. "[T]his result will simplify court procedures by

providing a uniform practice of judicial, rather than jury, review of quasi-judicial administrative decisions." *Id.*

Time has demonstrated that the California courts have not retreated from the policy announced in *Westlake*. *See, e.g., Knickerbocker v. City of Stockton*, 199 Cal. App. 3d 235, 244 Cal. Rptr. 764, 768 (1988) ("Unless the administrative decision is challenged, it binds the parties on the issues litigated and if those issues are fatal to a civil suit, the plaintiff cannot state a viable cause of action."); *Takahashi*, 249 Cal. Rptr. at 589-91 (holding that terminated teacher could have, and should have, asserted available defenses, including asserted violations of her constitutional and civil rights, at the administrative hearing); *Logan v. Southern Cal. Rapid Transit Dist.*, 136 Cal. App. 3d 116, 123, 185 Cal. Rptr. 878 (1982).

Swartzendruber adds little to the body of California law on this issue. The decision relies mainly on the authorities cited above, breaking no new ground on administrative estoppel. To the extent that *Swartzendruber* involved the combination of a § 1983 claim and an unreviewed agency determination, it represents a logical conclusion under the policies announced in *Westlake* and *Takahashi*.

Second, we conclude, as did the district court, that the prior history of the rule stated in *Swartzendruber* militates against strictly retrospective application. The underpinnings of *Swartzendruber* are unambiguous; to deny retroactive effect to the decision would thwart California's stated purposes for according preclusive effect to unreviewed administrative decisions.

Finally, we see no inequity resulting from retroactive application. Miller was notified of the mandamus review available to him after the adverse administrative decision. He was represented by counsel, who was in a position to evaluate the

likely effect, under California law, of failure to seek mandamus.

[8] We hold that *Swartzendruber* applies retroactively.[4]

B

Miller argues that *Swartzendruber* should not apply to this case because the County Civil Service Commission is not a creature of the California Administrative Procedure Act, Cal. Gov't Code § 11500, *et seq.* It is, rather, an administrative body authorized to hear appeals of dismissals, demotions, and suspensions. Santa Cruz Cty. Ord. § 3.24.010, *et seq.* Miller asserts that this distinction between *Swartzendruber* and this

[4]Miller also asserts that *Swartzendruber* should not be considered controlling state law. A state appellate court's announcement of a rule of law " 'is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.' " *Hicks v. Feiock*, 485 U.S. 624, 630 (1988) (quoting *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237-38 (1940)). Miller argues that the California Supreme Court's depublication of *Sanders v. City & County of San Francisco*, 6 Cal. App. 4th 626, 8 Cal. Rptr. 2d 170 (1992), which followed *Swartzendruber*, indicates the high court's disapproval of *Swartzendruber*. First, the depublication of *Sanders* is irrelevant. *See, e.g., People v. Saunders*, 5 Cal. 4th 580, 592, 10 Cal. Rptr. 2d 638, 643 (1993); *see also* Cal. R. Ct. 979(e) (an order directing depublication "shall not be deemed an expression of the opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion"). Second, *Sanders* relies on *Swartzendruber* for a proposition uncontested here, namely that a claim for sex discrimination under the California Fair Employment and Housing Act is not barred by the plaintiff's failure to seek mandamus, because recourse to the FEHA administrative procedures eliminates the need to pursue administrative mandamus pursuant to § 1094.5. *Sanders*, 8 Cal. Rptr. 2d at 177. The depublication of *Sanders*, even if we were inclined to consider it evidence, tells us nothing about the California Supreme Court's opinion of those principles of *Swartzendruber* we are applying here. Given the body of decisional law upon which *Swartzendruber* rests, there is no persuasive data that the California Supreme Court would decide otherwise.

case is fatal to the Commission's claim of preclusion. We disagree.

The protective provisions of the California APA do not define the minimum procedural safeguards which must be afforded before the California courts will accord an administrative decision preclusive effect. Neither *Swartzendruber* nor its predecessors rely on presence of APA safeguards in determining that an agency decision precluded further litigation. For example, *Westlake* involved the decision of a "tribunal of a private association." 131 Cal. Rptr. at 101. Yet the court held that a plaintiff must first succeed in overturning the quasi-judicial action before filing suit, as this "will simplify court procedures by providing a uniform practice of judicial, rather than jury, review of quasi-judicial administrative decisions." *Id.* Moreover, administrative preclusion has been acknowledged in cases involving public agencies not encompassed by the California APA, such as cities. *E.g., Knickerbocker*, 244 Cal. Rptr. 764.

This policy obtains even though the allegations relate to procedural defects, such as the absence of provisions for pretrial discovery.[5] In *Holder v. California Paralyzed Veterans Ass'n*, 114 Cal. App. 3d 155, 170 Cal. Rptr. 455 (1980), the plaintiff sued for damages, rather than seeking review pursuant to § 1094.5, after his expulsion from the California Paralyzed Veterans Association was upheld in an administrative hearing. The court explained that the plaintiff "claims that the

[5]Miller also asserts that the hearing procedure was defective because county commissions cannot, under California law, issue subpoenas. We are not convinced that state law prevents counties from granting civil service commissions the subpoena power. *See Dibb v. County of San Diego*, 18 Cal. App. 4th 1520, 23 Cal. Rptr. 2d 64, 67-68, *review granted*, 26 Cal. Rptr. 2d 475 (1993). The record is unclear as to whether the County Civil Service Commission has the power to issue subpoenas. Nevertheless, for the reasons stated in text, the absence of formal trial procedures has not historically prevented California courts from according preclusive effect to administrative decisions.

hearing procedure was so defective as to deny him fundamental due process, but such a procedural defect is a common ground for issuance of a writ of mandate invalidating a quasi-judicial decision." *Id.* at 460. This analysis is supported by *Westlake*, which notes that once the reviewing court determines that an administrative decision "cannot stand, either because of a substantive or procedural defect, the prevailing party is entitled to initiate a tort action . . . ." *Westlake*, 131 Cal. Rptr. at 101-02.

C

[9] Nor do we agree with Miller that the administrative decision is not binding because the Commission need not be constituted of lawyers. We are aware that our holding on this matter conflicts with that of the Third Circuit in *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3rd Cir. 1993). In *Edmundson*, the court determined that an administrative agency consisting of laypersons lacks the expertise to issue binding pronouncements in the area of constitutional law. *Id.* at 193. The commission's lack of expertise rendered its unreviewed finding that an employee's comments were not protected by the First Amendment not binding in a subsequent action under § 1983. *Id.*

Edmundson relies largely on the Supreme Court's "careful use of the word 'factfinding' " in *Elliot*. *Id.* at 193. *Edmundson* notes that "*Elliot* was quite specific . . . in referring consistently throughout the opinion to administrative or agency 'factfinding.' " *Edmundson*, 4 F.3d at 192. *Edmundson* construes the use of the word "factfinding" in a limiting manner, holding that preclusion principles do not apply beyond administrative factfinding.

We decline to adopt the conclusions reached in *Edmundson*. First of all, we will not follow a decision which conflicts with those of our own circuit. As the *Edmundson*

court itself acknowledges, its holding conflicts directly with our decision in *Eilrich*. *Id.* at 193.[6]

Second, in light of our prior holdings that legal conclusions are entitled to preclusive effect, the distinction made in *Edmundson* between lay decisionmakers and attorney decisionmakers would only create more confusion.[7] There is, moreover, no sound basis for according preclusive effect only to those legal determinations rendered by lawyers. Were we to focus on whether there was a statutory requirement that agency tribunals be composed of lawyers, we would create a rule which requires more of administrative decisionmakers than Article III of the Constitution requires of us. Article III does not require that we be lawyers to serve on the federal bench, yet we are fully capable of rendering binding decisions on constitutional matters. It similarly defies reason to focus on the *fact* of whether the agency decisionmakers are lawyers, whether the statute requires they be lawyers or not.[8]

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[6]As we have noted, *Eilrich* and *Plaine* establish that we will give preclusive effect to the legal as well as the factual decisions of administrative tribunals, if the courts of the state would do so and if the minimum requirements of *Utah Construction* are met. If this was overreaching, a question upon which we express no opinion, only an en banc panel can correct it.

[7]Although *Edmundson* purports to turn on the distinction between lay and attorney decisionmakers, the case is certainly open to the broader interpretation that no administrative agency may issue binding rulings on matters of constitutional law. Reasonable minds could differ on whether such a rule would comport with principles of finality and comity while at the same time serving important federal interests. But such a result would make much more sense than a preclusion rule which turns on the profession of the adjudicators.

[8]Even the *Edmundson* court recognized that its holding did not turn on such a "fortuitous event." *Id.* at 192 n.3. This inquiry would create the worst sort of trap for the unwary, requiring analysis, in future cases, of just how much legal training an adjudicator must have, whether the adjudicator must be admitted to the bar of a particular state or admitted to practice at all, whether the adjudicating panel must be composed partially or entirely of lawyers, and so on.

Third, the *Edmundson* rule engrafts onto federal common law a distinction unrecognized by the Supreme Court. The Supreme Court has directed us to determine preclusive effect with reference to whether the administrative agency is acting, fundamentally, in a judicial capacity. *Utah Construction*, 384 U.S. at 422. As the Court explained in *Astoria Federal Savings and Loan Ass'n v. Solimino*, 501 U.S. 104, 111 S. Ct. 2166, 2169 (1991):

> [R]epose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, which acts in a judicial capacity.

(citations omitted). We deny preclusive effect, in general, when the adjudicator lacks jurisdiction to determine an issue, *Shaw v. Calif. Dept. of Alcoholic Beverage Control*, 788 F.2d 600, 608 (9th Cir. 1986), when the parties lacked an adequate opportunity to litigate an issue, *Mack*, 798 F.2d at 1283, or when some other aspect of due process, the "full and fair opportunity" to litigate, is missing, *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81 (1982). The absence of a statutory requirement that an agency adjudicator have legal training simply does not implicate these concerns.

[10] Finally, the availability of judicial review, even if not always determinative, is of critical importance here. *See Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1474-75 (9th Cir. 1993) (holding that plaintiff was

"obligated" to challenge findings of administrative agency by direct appeal to state court under § 1094.5). Where, as here, the agency adjudication meets the requirements of due process, and de novo judicial review is available, *Eilrich*, 839 F.2d at 622, concerns of comity and finality counsel against denying preclusive effect.[9]

IV

Finally, Miller argues that, even if his § 1983 claims against the Commission are barred by the doctrines of res judicata and collateral estoppel, his claims against the individual defendants are not. We reject this contention. In both *Swartzendruber* and *Takahashi* the preclusive effect of the administrative ruling prevented litigation of § 1983 claims against the individual defendants named, as well as the administrative agency defendants. *See, Takahashi*, 249 Cal. Rptr. at 586. Here, as in *Takahashi*, the individually named defendants were employees acting with in the course and scope of their employment in terminating Miller. *Id.* Because they have been sued solely because of their involvement in the termination process, the adverse finding before the Commission prevents Miller from asserting an inconsistent claim against those defendants here. *See id.*

V

[11] We affirm the judgment of the district court. In so doing, we reiterate our longstanding policy, arising out of concerns of comity and finality, of respecting state court systems for review of administrative decisions. *Eilrich*, 839 F.2d at 633. California has made it quite clear that a discharged civil servant who *elects* an administrative forum for review of

[9]It should be remembered, in this context, that state courts have concurrent jurisdiction over § 1983 claims; we have no reason to suspect that the courts of California could not, if given the opportunity, correct an erroneous conclusion on a constitutional issue.

his or her termination must succeed in overturning that administrative decision through the judicial mandamus review procedure prior to filing a suit for damages on claims arising out of the termination. *See, e.g., Swartzendruber*, 5 Cal. Rptr. 2d at 69. So long as the minimum criteria of *Utah Construction* are met, we will defer to the considered judgment of the courts of California that an unreviewed agency determination, such as that involved here, is equivalent to a state court judgment entitled to res judicata and collateral estoppel effect. Any other result would render the administrative forum a place for meaningless dry runs of wrongful termination claims destined to be assailed on constitutional grounds in federal court.

AFFIRMED.

Appendix B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DOUGLAS MILLER, *Plaintiff-Appellant,* v. COUNTY OF SANTA CRUZ, et al., *Defendants-Appellees.*	No. 92-16694 D.C. No. CV-89-20131- WAI(EAI) ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Edward A. Infante, Magistrate Judge, Presiding

Argued and Submitted
March 14, 1994—San Francisco, California

Filed November 8, 1994
Amended December 27, 1994

Before: Dorothy W. Nelson and Robert R. Beezer, Circuit Judges and J. Spencer Letts,* District Judge.

Opinion by Judge Beezer

SUMMARY

Individual Rights/Civil Rights/Administrative Law

The court of appeals affirmed a district court judgment. The court held that a county civil service commission's unre-

*The Honorable J. Spencer Letts, United States District Judge for the Central District of California, sitting by designation.

viewed findings relating to a dismissal from employment were entitled to preclusive effect in the dismissed employee's subsequent civil rights action in the district court.

Appellant Douglas Miller was employed by the Sheriff's Department in appellee the County of Santa Cruz. His employment was terminated after four disciplinary actions. Miller contested his dismissal before the County Civil Service Commission. The Commission held a public evidentiary hearing at which Miller was represented by counsel and was permitted to present oral and documentary evidence and to call witnesses. The Commission sustained his dismissal, issuing written findings and conclusions.

Miller was notified of his right to seek judicial review in the Superior Court of California, but he elected not to do so. Instead, he filed a civil rights action, under 42 U.S.C. § 1983, in the district court. The district court granted summary judgment to the County and the individually named defendants. The court concluded that the doctrines of res judicata and collateral estoppel barred Miller's § 1983 suit because he failed to seek review of the adverse decision of the Commission. Miller appealed.

[1] Title 28 U.S.C. § 1738 requires the court of appeals to give the same preclusive effect to state court judgments as they would be given in the state in which they were rendered. **[2]** Federal courts give preclusive effect to the findings of state administrative tribunals in subsequent actions under § 1983; **[3]** the Ninth Circuit has held that such federal common law rules of preclusion extend to state administrative adjudications of legal as well as factual issues, even if unreviewed, so long as the state proceeding satisfies certain fairness requirements.

[4] California would have given preclusive effect to the judgment of the Commission had Miller brought his § 1983 action in state court. In *Swartzendruber v. City of San Diego*,

the California court of appeal gave preclusive effect to the unreviewed findings of a City Civil Service Commission under facts similar to the facts in this case. [5] The *Swartzendruber* court held that, unless state court review of the administrative findings is sought, an administrative hearing adjudication will bind the parties on issues litigated; the court's conclusion rested on both collateral estoppel and res judicata grounds.

[6] *Swartzendruber* dictated the preclusive effect of the Commission in this case. Miller, in his complaint in the district court, restated his wrongful termination contentions in constitutional terms. Whether characterized as the "issue" of the right to continued employment or as the "claim" of a civil rights violation, the unreviewed finding of the administrative tribunal precluded further litigation of Miller's contentions.

[7] The Supreme Court recently announced the standard for determining the retroactive application of a new rule announced in a civil case. [8] Under the Court's decision, the decision in *Swartzendruber* would apply retroactively. [9] Moreover, *Swartzendruber* neither overruled past precedent nor decided an issue of first impression whose resolution was not clearly foreshadowed. Rather, the case was completely in line with the logical progression of California law in the area of administrative preclusion. [10] Thus, *Swartzendruber* applies retroactively.

[11] Miller was incorrect in asserting that the administrative decision in this case was not binding because the Commission need not be constituted of lawyers. [12] Where, as in this case, the agency adjudication meets the requirements of due process and de novo judicial review is available, concerns of comity and finality counsel against denying preclusive effect.

[13] California has made it clear that a discharged civil servant who "elects" an administrative forum for review of his

or her termination must succeed in overturning that administrative decision through the judicial mandamus review procedure prior to filing a suit for damages on claims arising out of the termination. So long as certain minimum fairness criteria are met, the court of appeals will defer to the considered judgment of the courts of California that an unreviewed agency determination is equivalent to a state court judgment entitled to res judicata and collateral estoppel effect.

COUNSEL

Richard K. Abdalah, Jackson, Abdalah & Rodriguez, Cupertino, California, for the plaintiff-appellant.

Mark G. Bonino and Megan A. Smith, Ropers, Majeski, Kohn, Bently, Wagner & Kane, Redwood City, California, for the defendants-appellees.

ORDER

The opinion filed November 8, 1994, slip op. 13713, is amended as follows:

Slip Opinion at Pages 13722-13725

Delete all text in section III.A except final paragraph. Insert the following as section III.A:

> The Supreme Court recently announced the standard for determining the retroactive application of a new rule announced in a civil case. It stated:
>
> > "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and

> must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."

Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2517 (1993). This decision abandoned the former approach of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), which had employed a three-pronged test to determine the retroactive effect of new rules announced in civil cases.[4]

The California Supreme Court has not spoken on whether it will adopt the *Harper* analysis for purposes of determining the retroactivity of California civil decisions. California has previously applied *Chevron Oil* to determine the retroactive effect of civil cases. *See Casas v. Thompson*, 42 Cal. 3d 131, 140-42, 228 Cal. Rptr. 33, 38-39, *cert. denied*, 479 U.S. 1012 (1986). The California Supreme Court noted that "[t]he preliminary finding necessary to support a determination of nonretroactivity is that the decision must establish a new principle of law by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Casas*, 42 Cal. 3d at 141, 228 Cal. Rptr. at 39.

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[4] *Chevron Oil* required consideration of three factors: (1) whether the decision established a new principle of law, either by overruling clear past precedent on which the litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether, considering the prior history of the rule and its purpose and effect, retrospective application would have further retarded its operation, and (3) whether retroactive applications would have produced substantial inequitable results. 404 U.S. at 106-07.

Here, the district court applied the *Chevron Oil* factors and determined that *Swartzendruber* should be applied retroactively. Because the Supreme Court has abandoned *Chevron Oil* and because analysis of its three factors do not appear to be an independent requirement of the California Supreme Court, we need not engage in such an analysis.

Under *Harper*, the decision in *Swartzendruber* would apply retroactively.

We note, however, that even if California decided to adhere to the *Chevron Oil* factors, we would still agree with the district court in this case. *Swartzendruber* neither overrules past precedent nor decides an issue of first impression whose resolution was not clearly foreshadowed. Rather, *Swartzendruber* is completely in line with the logical progression of California law in the area of administrative preclusion. *See Westlake Community Hosp. v. Superior Ct.*, 17 Cal. 3d 465, 131 Cal. Rptr. 90 (1976); *Knickerbocker v. City of Stockton*, 199 Cal. App. 3d 235, 244 Cal. Rptr. 764 (1988); *Takahashi*, 249 Cal. Rptr. at 589-91. Indeed, the *Swartzendruber* decision breaks no new ground on administrative estoppel. Finally, we see no inequity resulting from retroactive application. Miller was notified of the mandamus review available to him after the adverse administrative decision. He was represented by counsel, who was in a position to evaluate the likely effect, under California law, of failure to seek mandamus.

Slip Opinion at Page 13725

Re-number footnote 4 as footnote 5. Change footnotes 5-9 to footnotes 6-10.

OPINION

BEEZER, Circuit Judge:

Douglas Miller appeals the district court's grant of summary judgment to the County of Santa Cruz and the individually named defendants. The district court concluded that the doctrines of res judicata and collateral estoppel barred Miller's federal suit under 42 U.S.C. § 1983 because he failed to seek review of the adverse decision of the Santa Cruz County Civil Service Commission. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

Miller was employed by the Santa Cruz County Sheriff's Department from December 1980 until February 1988. He was terminated after four disciplinary actions, the last of which related to an alleged failure to report an overpayment of wages. Miller contested his dismissal before the Santa Cruz County Civil Service Commission. The Commission held a public evidentiary hearing at which Miller was represented by counsel and was permitted to present oral and documentary evidence and to call witnesses. The Commission sustained his dismissal, issuing written findings and conclusions.

Miller was notified of his right to seek judicial review in the Superior Court of California. Cal. Code Civ. P. §§ 1094.5 and 1094.6. He elected not to do so. Instead he filed this suit under 42 U.S.C. § 1983 in the United States District Court. Magistrate Judge Infante, sitting by consent of the parties, granted the County's motion for summary judgment on res judicata and collateral estoppel grounds.[1]

[1]We reject Miller's contention that summary judgment was improper because the magistrate judge implicitly modified the pretrial order by allowing defendants to file the motion. A magistrate before whom the parties have consented to appear has the same power to issue or modify pre-

II

The question presented is whether unreviewed findings of a state administrative tribunal are entitled to preclusive effect in a subsequent § 1983 action in federal court. We review de novo a grant of summary judgment. *Maffei v. Northern Ins. Co.*, 12 F.3d 892, 895 (9th Cir. 1993). We review de novo the district court's determination that res judicata and collateral estoppel are available. *Guild Wineries and Distilleries v. Whitehall Co.*, 853 F.2d 755, 758 (9th Cir. 1988); *Plaine v. McCabe*, 797 F.2d 713, 718 (9th Cir. 1986). If we determine that collateral estoppel is available, we review for abuse of discretion the district court's decision to accord preclusion to the agency's decision. *Plaine*, 797 F.2d at 718.

A

[1] Title 28 U.S.C. § 1738 requires that we give the same preclusive effect to state court judgments as they would be given in the state in which they were rendered. *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380 (1985).

[2] Section 1738 does not govern cases involving unreviewed decisions of a state administrative hearing board or commission. *University of Tennessee v. Elliot*, 478 U.S. 788, 794 (1986). Nonetheless, as a matter of federal common law, federal courts give preclusive effect to the findings of state administrative tribunals in subsequent actions under § 1983. *Id.* at 797-99.

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trial orders as a district court judge, and that determination can be set aside only if clearly erroneous and contrary to law. 28 U.S.C. § 636(b)(1)(A). The magistrate judge's decision was neither clearly erroneous nor contrary to law. Moreover, Miller did not object to the magistrate judge's decision to allow defendants to file the motion, nor did he object in his opposition to summary judgment. He suffered no prejudice.

[3] *Elliot* requires us to give preclusive effect, at a minimum, to the factfinding of state administrative tribunals. We have gone further, however, and held that "the federal common law rules of preclusion described in *Elliot* extend to state administrative adjudications of legal as well as factual issues, even if unreviewed, so long as the state proceeding satisfies the requirements of fairness outlined in [*United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966)]." *Guild Wineries*, 853 F.2d at 758. The fairness requirements of *Utah Construction* are: (1) that the administrative agency act in a judicial capacity, (2) that the agency resolve disputed issues of fact properly before it, and (3) that the parties have an adequate opportunity to litigate. 384 U.S. at 422.

Our reasons for according preclusive effect to unreviewed agency determinations are outlined in detail in *Plaine*, 797 F.2d at 718-721. *Plaine* involved a decision by the California Corporations Commissioner that a merger price was fair. The plaintiff could have, but did not, seek review of the decision in state court. Rather, she brought an action in federal court asserting that defendants violated section 14(e) of the Securities and Exchange Act of 1934. We concluded that the commissioner's unreviewed fairness determination was entitled to preclusive effect. *Id.* at 721. We explained that:

> The Supreme Court has held that administrative proceedings may be given preclusive effect accorded to a court "[w]hen an administrative agency is acting *in a judicial capacity* and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate."

Id. (emphasis in original) (quoting *Utah Construction*, 384 U.S. at 422). We reasoned, therefore, that when an administrative proceeding meets the *Utah Construction* requirements, "it may rise to the level of a 'judicial proceeding' entitled to preclusive effect by section 1738." *Id.* at 719.

The threshold inquiry, we held, is whether a state administrative proceeding was conducted with sufficient safeguards "to be equated with a state court judgment." *Id.* This requires careful review of the administrative record "to ensure that, at a minimum, it meets the state's own criteria necessary to require a court of that state to give preclusive effect to the state agency's decisions." *Id.* We also noted that although a federal court should ordinarily give preclusive effect when the state court would do so, "there may be occasions where a state court would give preclusive effect to an administrative decision that failed to meet the minimum criteria set down in *Utah Construction*."[2] *Id.* at 719, n.13. However, we determined that there were no special circumstances requiring us to look beyond the state's preclusion law, because California had already adopted the *Utah Construction* standard. *Id.* at 719-20 & n.13.

If *Plaine* left any doubt as to the preclusive effect we will give to unreviewed state agency determinations in cases such as Miller's, it was eliminated in *Eilrich v. Remas*, 839 F.2d 630 (9th Cir. 1988), *cert. denied*, 488 U.S. 819 (1988). Eilrich was a municipal police officer discharged after making certain public statements. There, we reiterated our holding in *Plaine* that the only question, in light of California's incorporation of the *Utah Construction* standard, was whether the administrative hearing met the requirements of California law such that a California court would have accorded the determination preclusive effect. *Id.* at 633. We also reiterated that because an adequate opportunity for de novo judicial review was available under California law, Eilrich could not " 'obstruct the preclusive use of the state administrative decision simply by

[2]We determined, for example, in *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1283-84 (9th Cir. 1986) that an informally administered unemployment benefits hearing did not provide plaintiff with an adequate opportunity to litigate factual issues related to an age discrimination claim. We therefore declined to afford preclusive effect to the decision, regardless of whether the state court would have done so.

foregoing [the] right to appeal.' " *Id.* at 632 (quoting *Plaine*, 797 F.2d at 719 n.12); *see also Guild Wineries*, 853 F.2d at 761-62 ("alleged faulty reasoning must be pursued on direct appeal and does not justify denying claim preclusive effect").[3]

B

[4] There is no genuine dispute that California would give preclusive effect to the judgment of the Civil Service Commission had Miller brought his § 1983 action in state court. In *Swartzendruber v. City of San Diego*, 3 Cal. App. 4th 896, 5 Cal. Rptr. 2d 64, 71 (1992), the court gave preclusive effect to the unreviewed findings of the City Civil Service Commission. The facts are remarkably similar to the facts here. Swartzendruber was terminated for not obeying a direct order to appear for work in a uniform. The Commission upheld her termination, and she did not seek review under §§ 1094.5 and 1094.6. She then sued in state superior court, alleging, in part, that her civil rights had been violated.

[5] The *Swartzendruber* court held that, unless state court review of the administrative findings is sought, "an administrative hearing adjudication binds the parties on the issues litigated." *Id.* The court's ultimate conclusion rests on both collateral estoppel and res judicata grounds.

To determine whether the "issue" of Swartzendruber's civil rights had been determined, the court examined the scope of

[3]Miller cites *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982), and *Sisk v. CSO Branch*, 974 F.2d 116 (9th Cir. 1992), for the proposition that he is not required to exhaust administrative remedies prior to filing suit under § 1983. These decisions are inapposite. Nothing prevented Miller, *prior to* his appeal to the Civil Service Commission, from filing suit in either state or federal court under § 1983. No exhaustion requirement has been imposed on Miller. It is Miller's election to pursue his claim initially in an administrative forum, and to forego his right to seek judicial review in state court, which requires us to determine whether that decision is binding on all that was, or could have been, determined there.

the cause of action "to determine if it encompasses the same primary right that was at stake in the Commission proceeding." *Id.* at 71. The court concluded that Swartzendruber's allegations that her federal civil rights had been violated merely restated her cause of action for wrongful termination in constitutional terms. The same primary right, the right to continued employment, was at stake in both actions. Because the issue of her right to employment had already been adjudicated, Swartzendruber was collaterally estopped from relitigating the issue of her termination in the guise of a § 1983 action alleging violations of her civil rights.

The court also applied principles of res judicata to Swartzendruber's "claim" that her civil rights had been violated. It held that Swartzendruber's failure to "interpose before the Commission any defense to the charge of insubordination, including defenses that the City's actions violated her civil rights," was fatal to her § 1983 claim. The court quoted the following language of *Takahashi v. Board of Education*, 202 Cal. App. 3d 1464, 249 Cal. Rptr. 578, 591 (1988), *cert. denied*, 490 U.S. 1011 (1989):

> There can be no justification for plaintiff's position that she should be permitted to fail to assert at the administrative hearing constitutional and civil rights violations as reasons that made her termination wrongful, fail to prevail on the writ without attempting to urge or to bring before the court those reasons, and then be allowed to recover damages in this consolidated action that resulted from termination of her employment alleged to be wrongful based on those same reasons.

Swartzendruber, 5 Cal. Rptr. 2d at 72.

[6] *Swartzendruber* dictates the preclusive effect of the civil service commission in this case. Miller, in his complaint in district court, restates his wrongful termination contentions

in constitutional terms. Whether characterized as the "issue" of the right to continued employment or as the "claim" of a civil rights violation, the unreviewed finding of the administrative tribunal precludes further litigation of Miller's contentions.

III

Miller interposes various objections to the application of *Swartzendruber* to his claim. First, he argues that *Swartzendruber* should not be applied retroactively. He further argues that, even if *Swartzendruber* may be applied retroactively, it does not apply to the facts of this case because certain procedural safeguards were not present and because the Commission is not composed of lawyers. We reject these arguments.

A

[7] The Supreme Court recently announced the standard for determining the retroactive application of a new rule announced in a civil case. It stated:

> "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."

Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2517 (1993). This decision abandoned the former approach of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), which had employed a three-pronged test to determine the retroactive effect of new rules announced in civil cases.[4]

[4]*Chevron Oil* required consideration of three factors: (1) whether the decision established a new principle of law, either by overruling clear past

The California Supreme Court has not spoken on whether it will adopt the *Harper* analysis for purposes of determining the retroactivity of California civil decisions. California has previously applied *Chevron Oil* to determine the retroactive effect of civil cases. *See Casas v. Thompson*, 42 Cal. 3d 131, 140-42, 228 Cal. Rptr. 33, 38-39, *cert. denied*, 479 U.S. 1012 (1986). The California Supreme Court noted that "[t]he preliminary finding necessary to support a determination of nonretroactivity is that the decision must establish a new principle of law by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Casas*, 42 Cal. 3d at 141, 228 Cal. Rptr. at 39.

Here, the district court applied the *Chevron Oil* factors and determined that *Swartzendruber* should be applied retroactively. Because the Supreme Court has abandoned *Chevron Oil* and because analysis of its three factors do not appear to be an independent requirement of the California Supreme Court, we need not engage in such an analysis.

[8] Under *Harper*, the decision in *Swartzendruber* would apply retroactively.

[9] We note, however, that even if California decided to adhere to the *Chevron Oil* factors, we would still agree with the district court in this case. *Swartzendruber* neither overrules past precedent nor decides an issue of first impression whose resolution was not clearly foreshadowed. Rather, *Swartzendruber* is completely in line with the logical progression of California law in the area of administrative preclusion. *See Westlake Community Hosp. v. Superior Ct.*, 17 Cal. 3d

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precedent on which the litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether, considering the prior history of the rule and its purpose and effect, retrospective application would have further retarded its operation, and (3) whether retroactive applications would have produced substantial inequitable results. 404 U.S. at 106-07.

465, 131 Cal. Rptr. 90 (1976); *Knickerbocker v. City of Stockton*, 199 Cal. App. 3d 235, 244 Cal. Rptr. 764 (1988); *Takahashi*, 249 Cal. Rptr. at 589-91. Indeed, the *Swartzendruber* decision breaks no new ground on administrative estoppel. Finally, we see no inequity resulting from retroactive application. Miller was notified of the mandamus review available to him after the adverse administrative decision. He was represented by counsel, who was in a position to evaluate the likely effect, under California law, of failure to seek mandamus.

[10] We hold that *Swartzendruber* applies retroactively.[5]

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[5]Miller also asserts that *Swartzendruber* should not be considered controlling state law. A state appellate court's announcement of a rule of law " 'is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.' " *Hicks v. Feiock*, 485 U.S. 624, 630 (1988) (quoting *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237-38 (1940)). Miller argues that the California Supreme Court's depublication of *Sanders v. City & County of San Francisco*, 6 Cal. App. 4th 626, 8 Cal. Rptr. 2d 170 (1992), which followed *Swartzendruber*, indicates the high court's disapproval of *Swartzendruber*. First, the depublication of *Sanders* is irrelevant. *See, e.g., People v. Saunders*, 5 Cal. 4th 580, 592, 10 Cal. Rptr. 2d 638, 643 (1993); *see also* Cal. R. Ct. 979(e) (an order directing depublication "shall not be deemed an expression of the opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion"). Second, *Sanders* relies on *Swartzendruber* for a proposition uncontested here, namely that a claim for sex discrimination under the California Fair Employment and Housing Act is not barred by the plaintiff's failure to seek mandamus, because recourse to the FEHA administrative procedures eliminates the need to pursue administrative mandamus pursuant to § 1094.5. *Sanders*, 8 Cal. Rptr. 2d at 177. The depublication of *Sanders*, even if we were inclined to consider it evidence, tells us nothing about the California Supreme Court's opinion of those principles of *Swartzendruber* we are applying here. Given the body of decisional law upon which *Swartzendruber* rests, there is no persuasive data that the California Supreme Court would decide otherwise.

B

Miller argues that *Swartzendruber* should not apply to this case because the County Civil Service Commission is not a creature of the California Administrative Procedure Act, Cal. Gov't Code § 11500, *et seq.* It is, rather, an administrative body authorized to hear appeals of dismissals, demotions, and suspensions. Santa Cruz Cty. Ord. § 3.24.010, *et seq.* Miller asserts that this distinction between *Swartzendruber* and this case is fatal to the Commission's claim of preclusion. We disagree.

The protective provisions of the California APA do not define the minimum procedural safeguards which must be afforded before the California courts will accord an administrative decision preclusive effect. Neither *Swartzendruber* nor its predecessors rely on presence of APA safeguards in determining that an agency decision precluded further litigation. For example, *Westlake* involved the decision of a "tribunal of a private association." 131 Cal. Rptr. at 101. Yet the court held that a plaintiff must first succeed in overturning the quasi-judicial action before filing suit, as this "will simplify court procedures by providing a uniform practice of judicial, rather than jury, review of quasi-judicial administrative decisions." *Id.* Moreover, administrative preclusion has been acknowledged in cases involving public agencies not encompassed by the California APA, such as cities. *E.g., Knickerbocker*, 244 Cal. Rptr. 764.

This policy obtains even though the allegations relate to procedural defects, such as the absence of provisions for pretrial discovery.[6] In *Holder v. California Paralyzed Veterans*

[6]Miller also asserts that the hearing procedure was defective because county commissions cannot, under California law, issue subpoenas. We are not convinced that state law prevents counties from granting civil service commissions the subpoena power. *See Dibb v. County of San Diego*, 18 Cal. App. 4th 1520, 23 Cal. Rptr. 2d 64, 67-68, *review granted*, 26 Cal.

Ass'n, 114 Cal. App. 3d 155, 170 Cal. Rptr. 455 (1980), the plaintiff sued for damages, rather than seeking review pursuant to § 1094.5, after his expulsion from the California Paralyzed Veterans Association was upheld in an administrative hearing. The court explained that the plaintiff "claims that the hearing procedure was so defective as to deny him fundamental due process, but such a procedural defect is a common ground for issuance of a writ of mandate invalidating a quasi-judicial decision." *Id.* at 460. This analysis is supported by *Westlake*, which notes that once the reviewing court determines that an administrative decision "cannot stand, either because of a substantive or procedural defect, the prevailing party is entitled to initiate a tort action . . . ." *Westlake*, 131 Cal. Rptr. at 101-02.

C

[11] Nor do we agree with Miller that the administrative decision is not binding because the Commission need not be constituted of lawyers. We are aware that our holding on this matter conflicts with that of the Third Circuit in *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3rd Cir. 1993). In *Edmundson*, the court determined that an administrative agency consisting of laypersons lacks the expertise to issue binding pronouncements in the area of constitutional law. *Id.* at 193. The commission's lack of expertise rendered its unreviewed finding that an employee's comments were not protected by the First Amendment not binding in a subsequent action under § 1983. *Id.*

Edmundson relies largely on the Supreme Court's "careful use of the word 'factfinding' " in *Elliot*. *Id.* at 193.

Rptr. 2d 475 (1993). The record is unclear as to whether the County Civil Service Commission has the power to issue subpoenas. Nevertheless, for the reasons stated in text, the absence of formal trial procedures has not historically prevented California courts from according preclusive effect to administrative decisions.

Edmundson notes that "*Elliot* was quite specific . . . in referring consistently throughout the opinion to administrative or agency 'factfinding.'" *Edmundson*, 4 F.3d at 192. *Edmundson* construes the use of the word "factfinding" in a limiting manner, holding that preclusion principles do not apply beyond administrative factfinding.

We decline to adopt the conclusions reached in *Edmundson*. First of all, we will not follow a decision which conflicts with those of our own circuit. As the *Edmundson* court itself acknowledges, its holding conflicts directly with our decision in *Eilrich*. *Id.* at 193.[7]

Second, in light of our prior holdings that legal conclusions are entitled to preclusive effect, the distinction made in *Edmundson* between lay decisionmakers and attorney decisionmakers would only create more confusion.[8] There is, moreover, no sound basis for according preclusive effect only to those legal determinations rendered by lawyers. Were we to focus on whether there was a statutory requirement that agency tribunals be composed of lawyers, we would create a rule which requires more of administrative decisionmakers than Article III of the Constitution requires of us. Article III does not require that we be lawyers to serve on the federal

[7]As we have noted, *Eilrich* and *Plaine* establish that we will give preclusive effect to the legal as well as the factual decisions of administrative tribunals, if the courts of the state would do so and if the minimum requirements of *Utah Construction* are met. If this was overreaching, a question upon which we express no opinion, only an en banc panel can correct it.

[8]Although *Edmundson* purports to turn on the distinction between lay and attorney decisionmakers, the case is certainly open to the broader interpretation that no administrative agency may issue binding rulings on matters of constitutional law. Reasonable minds could differ on whether such a rule would comport with principles of finality and comity while at the same time serving important federal interests. But such a result would make much more sense than a preclusion rule which turns on the profession of the adjudicators.

bench, yet we are fully capable of rendering binding decisions on constitutional matters. It similarly defies reason to focus on the *fact* of whether the agency decisionmakers are lawyers, whether the statute requires they be lawyers or not.[9]

Third, the *Edmundson* rule engrafts onto federal common law a distinction unrecognized by the Supreme Court. The Supreme Court has directed us to determine preclusive effect with reference to whether the administrative agency is acting, fundamentally, in a judicial capacity. *Utah Construction*, 384 U.S. at 422. As the Court explained in *Astoria Federal Savings and Loan Ass'n v. Solimino*, 501 U.S. 104, 111 S. Ct. 2166, 2169 (1991):

> [R]epose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, which acts in a judicial capacity.

(citation omitted). We deny preclusive effect, in general, when the adjudicator lacks jurisdiction to determine an issue, *Shaw v. Calif. Dept. of Alcoholic Beverage Control*, 788 F.2d

[9]Even the *Edmundson* court recognized that its holding did not turn on such a "fortuitous event." *Id.* at 192 n.3. This inquiry would create the worst sort of trap for the unwary, requiring analysis, in future cases, of just how much legal training an adjudicator must have, whether the adjudicator must be admitted to the bar of a particular state or admitted to practice at all, whether the adjudicating panel must be composed partially or entirely of lawyers, and so on.

600, 608 (9th Cir. 1986), when the parties lacked an adequate opportunity to litigate an issue, *Mack*, 798 F.2d at 1283, or when some other aspect of due process, the "full and fair opportunity" to litigate, is missing, *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81 (1982). The absence of a statutory requirement that an agency adjudicator have legal training simply does not implicate these concerns.

[12] Finally, the availability of judicial review, even if not always determinative, is of critical importance here. *See Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1474-75 (9th Cir. 1993) (holding that plaintiff was "obligated" to challenge findings of administrative agency by direct appeal to state court under § 1094.5). Where, as here, the agency adjudication meets the requirements of due process, and de novo judicial review is available, *Eilrich*, 839 F.2d at 622, concerns of comity and finality counsel against denying preclusive effect.[10]

IV

Finally, Miller argues that, even if his § 1983 claims against the Commission are barred by the doctrines of res judicata and collateral estoppel, his claims against the individual defendants are not. We reject this contention. In both *Swartzendruber* and *Takahashi* the preclusive effect of the administrative ruling prevented litigation of § 1983 claims against the individual defendants named, as well as the administrative agency defendants. *See, Takahashi*, 249 Cal. Rptr. at 586. Here, as in *Takahashi*, the individually named defendants were employees acting with in the course and scope of their employment in terminating Miller. *Id.* Because they have been sued solely because of their involvement in

[10]It should be remembered, in this context, that state courts have concurrent jurisdiction over § 1983 claims; we have no reason to suspect that the courts of California could not, if given the opportunity, correct an erroneous conclusion on a constitutional issue.

the termination process, the adverse finding before the Commission prevents Miller from asserting an inconsistent claim against those defendants here. *See id.*

V

[13] We affirm the judgment of the district court. In so doing, we reiterate our longstanding policy, arising out of concerns of comity and finality, of respecting state court systems for review of administrative decisions. *Eilrich*, 839 F.2d at 633. California has made it quite clear that a discharged civil servant who *elects* an administrative forum for review of his or her termination must succeed in overturning that administrative decision through the judicial mandamus review procedure prior to filing a suit for damages on claims arising out of the termination. *See, e.g., Swartzendruber*, 5 Cal. Rptr. 2d at 69. So long as the minimum criteria of *Utah Construction* are met, we will defer to the considered judgment of the courts of California that an unreviewed agency determination, such as that involved here, is equivalent to a state court judgment entitled to res judicata and collateral estoppel effect. Any other result would render the administrative forum a place for meaningless dry runs of wrongful termination claims destined to be assailed on constitutional grounds in federal court.

AFFIRMED.

Appendix C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

DOUGLAS MILLER,	) No. 92-16694
Plaintiff-Appellant,	) D.C. No. CV-89-20131-WAI(EAI)
v.	) ORDER
COUNTY OF SANTA CRUZ, et al.,	)
Defendants-Appellees.	)

Before: D.W. NELSON and BEEZER, Circuit Judges and LETTS,* District Judge

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested to vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable J. Spencer Letts, United States District Judge for the Central District of California, sitting by designation.

Appendix D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DOUGLAS MILLER, Plaintiff, v. COUNTY OF SANTA CRUZ, SHERIFF, AL NOREN, OFFICER MARILYN WEAVER, OFFICER TERRY MOORE, and DOES I through XX, inclusive, Defendants.	No. C 89-20131 EAI ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON RES JUDICATA/ COLLATERAL ESTOPPEL GROUNDS

I. Background

Plaintiff Douglas Miller ("Miller") was employed as a detention officer by the Santa Cruz County Sheriff's Department from December 1980 until September 24, 1987. During the course of his employment, four

disciplinary actions were taken against him. The last action involved Miller's alleged knowing failure to report a salary overpayment and resulted in his dismissal.

Under the Santa Cruz County Civil Service Ordinance Code a discharged employee has the right to appeal his termination to the County Civil Service Commission ("the Commission"). Miller exercised this right, and, after an evidentiary hearing on January 27, 1988, the Commission upheld the dismissal. Miller did not seek judicial review of the Commission's determination.

Miller filed this action in 1989, alleging violations of his civil rights pursuant to 42 U.S.C. Section 1983. and naming Santa Cruz County, Santa Cruz County Sheriff Al Noren, and Officer Terry Moore as defendants. Specifically, Miller alleges that defendants violated his rights to equal protection of the laws, substantive due process, and procedural due process.

II. Motion Before the Court

All defendants seek summary judgment on the theory that this action is barred by the doctrines of res judicata/collateral estoppel. Alternatively, Sheriff Noren seeks summary judgment, in his favor alone, on the theory that the undisputed facts show that he is entitled to the defense of qualified immunity. For the reasons set forth below, defendants' Motion for Summary Judgment is hereby GRANTED.[1]

III. Summary Judgment Standard

Rule 56(c), F.R.Civ.P., provides that upon motion, summary judgment shall be rendered:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to material fact and that the moving party is entitled to a judgment as a matter of law."

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[1]The parties have consented that all proceedings, including trial, in the above entitled case may be heard and finally adjudicated by the assigned magistrate judge, pursuant to Rule 73, F.R.Civ.P. and 28 U.S.C. Section 636(c).

Once a proper motion is made, entry of summary judgment is mandated where the responding party fails to make a showing sufficient to establish the existence of an element to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The test used to determine whether summary judgment should be granted "mirrors" that applied to a motion for a directed verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "Where the record taken as whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Summary judgment is especially appropriate where there is no genuine issue of material fact and the only dispute is as to pure legal actions. Smith v. Califano, 597 F.2d 152 (9th Cir. 1979). In this instance,

defendants move for summary judgment based on res judicata/collateral estoppel grounds which, if applicable, is a proper grounds for summary judgment. Eilrich v. Remas, 839 F.2d 630 (9th Cir. 1988). Alternatively, defendant Noren moves for summary judgment on the grounds that he is entitled to qualified immunity, which may also provide a proper basis for summary judgment. Thorsted v. Kelly, 585 F.2d 571, 575 (10th Cir. 1988).

IV. Discussion

"When a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' [citation omitted] federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's courts." University of Tennessee v. Elliott, 478 U.S. 788, 796-799, 106 S.Ct. 3220, 92 L.Ed.2d (1986). This is so, even though the proceedings resolved disputed issues of fact which are later pled to allege a civil rights violation. Id. Relying on

Swartzendruber v. City of San Diego, 3 Cal.App. 4th 896, 908, 5 Cal. Rptr. 2d 64 (Cal. App. 4 Dist. 1992), defendants argue that since Miller failed to seek writ review of the Commission's determination in state court, pursuant to Cal. Civ. Pro. Code Section 1094.5 ("Section 1094.5"), that determination is binding on the parties. Swartzendruber follows a well established line of California Supreme Court cases and is fully applicable here.

In Boren v. State Personnel Board, 37 Cal. 2d 634, 637, 234 P.2d 981 (1951), the California Supreme Court held that writ of mandamus pursuant to Section 1094.5 is the appropriate procedure for inquiring into the validity of any final administrative order regarding public employee discipline. Thereafter, the California Supreme Court held, where a discharged public employee seeks to enforce the same right in a state court action that was litigated in an administrative forum, a mandamus proceeding is a prerequisite to a tort action. Westlake

Community Hospital v. Superior Court, 17 Cal. 3d 465, 551 P.2d 410, 131 Cal.Rptr. 90 (1976).[2]

Subsequently, in Swartzendruber, the California Court of Appeals for the 4th District applied this rule to actions alleging federal civil rights violations. The plaintiff in Swartzendruber was terminated from her position as a code compliance officer with the City of San Diego for insubordination. Swartzendruber appealed her termination to the City Civil Service Commission, which upheld the termination, but required she be put on eligibility lists for future positions for which she was qualified. She did not petition for a writ of mandamus pursuant to Section 1094.5. The court held that since

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[2]California Courts of Appeal have rendered decisions following that line of cases. See, e.g., Logan v. Southern California Rapid Transit District, 136 Cal.App. 3d 116, 185 Cal.Rptr. 878 (Cal. App. 2 Dist. 1982), (discharged governmental employee's claims for breach of contract and intentional infliction of emotional distress barred for failure to seek writ review); City of Fresno v. Superior Court, 188 Cal. App. 3d 1484, 234 Cal. Rptr. 136 (Cal. App. 5 Dist. 1987), (discharged city employee's action for damages held premature until personnel board's decision overturned through mandamus procedure).

plaintiff failed to seek judicial review of the Civil Service Commission determination, she could not pursue an action for damages, pursuant to federal civil rights statutes, arising out of the termination of her employment since it involved the same primary rights. Swartzendruber, supra.

The primary rights theory, which is used in California to determine the scope of causes of action, provides that "there is only a single cause of action for the invasion of one primary right." Swartzendruber, at 904. To determine what the primary right is, the court must look at the harm suffered. Id. In Swartzendruber, the court held that the primary right at stake was the plaintiff's right to continued employment. The court further held that plaintiff's cause of action alleging a violation of her civil rights did not present a separate injury from that which was litigated before the Commission. Quoting Slater v. Blackwood, 15 Cal. 3d 791, 795, 126 Cal. Rptr. 225, 543 P.2d 593 (1975), the

court stated "[e]ven where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." Swartzendruber, at 908. In the instant case, as in Swartzendruber , Miller has "merely restated [his] cause of action for wrongful termination in constitutional terms." Id.

Plaintiff here contends, as did Swartzendruber, that neither res judicata nor collateral estoppel should be applied to his Section 1983 claim because it was not litigated before the Civil Service Commission. However, in Swartzendruber , the court applied res judicata to plaintiff's Section 1983 claim since she could have interposed her federal civil rights claim as a defense in the proceeding before the Commission. The Santa Cruz County Civil Service Commission's procedural rules permit a petitioner to frame the issues for hearing and do not place any limits on the defenses or contentions which a petitioner may raise. Moreover, plaintiff has not presented any evidence to the court in support of his

contention that he could not have raised his civil rights claims before the Commission.[3]

Miller also contends that because neither the Santa Cruz County Ordinance Code nor the procedural rules of the commission expressly provide for pre-hearing discovery, he was denied the opportunity to adequately litigate his claims.[4] However, Miller cites no authority for the proposition that the absence of pretrial discovery procedures constitutes a per se denial of the required opportunity to adequately litigate his claims. Moreover, constitutional due process does not require an agency to

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[3] Miller argues that because the Administrative Procedure Act ("the APA"), California Government Code Section 11500 et seq., does not apply to the Santa Cruz County Civil Service Commission Swartzendruber is distinguishable. However, it is unimportant whether or not the APA applied to the proceeding before the Commission. The issue is whether or not Miller had an adequate opportunity to litigate his claim before the Commission, as required by University of Tennessee v. Elliott, supra.

[4] Specifically, Miller complains that he did not receive a copy of a memorandum written by one of his supervisors and addressed to Sheriff Noren. He also complains that he could not gain access to the personnel files of other officers.

afford a petitioner all elements of a traditional judicial proceeding. See, Lew v. Kona Hospital, 754 F.2d 1420, 1424, (9th Cir. 1985) (due process requirements met in administrative proceeding even though no provision for 1) pretrial discovery or 2) strict adherence to the rules of evidence).

Pursuant to the Santa Cruz County Ordinance Code Section 3.24.030 and the procedural rules of the Commission, plaintiff had the right to: (1) frame the issues for hearing, (2) a public hearing, and (3) obtain a continuance upon a showing of good cause. At the hearing before the Commission, Miller was represented by counsel, was permitted to present oral and documentary evidence, and was permitted to call witnesses. Subsequent to the hearing, the Commission issued a written decision which included the Commission's specific factual findings, its determination, and a notice that Miller had the right to seek a writ of mandamus pursuant to Section 1094.5. As such, Miller

had an adequate opportunity to litigate his claim as required by University of Tennessee v. Elliott, supra, 478 U.S. 788, 796-799, (1986), and United States v. Utah Construction and Mining Co., 384 U.S. 394, 422, 16 L.Ed.2d 642, 86 S.Ct. 1545, 1560 (1966). See also, Plaine v. McCabe, 797 F.2d 713 (9th Cir. 1986).

Plaintiff further argues that Swartzendruber should not be given retroactive application. In considering whether to apply a judicial decision retroactively, the court must consider: (1) whether the new decision overruled clear past precedent on which litigants may have relied or decided an issue of first impression, the resolution of which was not clearly foreshadowed, (2) the prior history of the rule and whether retrospective operation will further retard its operation, and (3) whether retroactive application would produce substantially inequitable results. Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L.3d.2d 296, 306, 92 S.Ct. 349 (1971). Miller's contention that his action

should not be barred because Swartzendruber should not be given retroactive application is without merit.

First, the result in Swartzendruber was clearly foreshadowed by a line of California Supreme Court cases as well as United States Supreme Court law. See, supra, Boren, 37 Cal.2d 634, 637; Westlake, 17 Cal.3d 465; and University of Tennessee v. Elliott, 478 U.S. 788. In addition, Swartzendruber does not overrule past precedent. Rather, it is a predictable application of the holdings in Boren and Westlake.

Second, to withhold retroactive application of Swartzendruber would be to permit plaintiff to avoid the procedural requirements of Section 1094.5, a result which Swartzendruber and the prior California Supreme Court cases clearly meant to avoid. Finally, in view of the precedent proceeding Swartzendruber and the notice for judicial review attached to the Commission's determination, Miller should have been aware that his proper recourse was to seek a writ of mandamus in the

California Supreme Court. Therefore, retroactive application of Swartzendruber barring plaintiff from pursuing his Section 1983 claim in this court is not substantially inequitable. Furthermore, given prior precedent, retroactive application of Swartzendruber is not necessary because prior California Supreme Court law provides ample authority for the result reached here. See, Boren, supra, and Westlake, supra.

V. Conclusion

Plaintiff's claims are barred by the doctrines of res judicata/collateral estoppel since he had an adequate opportunity to litigate his claim before the Civil Service Commission and he failed to seek mandamus review of the Commission's decision upholding his dismissal. Accordingly, defendants' motion for summary judgment is GRANTED.[5]

IT IS SO ORDERED.

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[5] Because defendants' motion is granted on res judicata/collateral estoppel grounds, the court does not reach the qualified immunity issue.

Dated: July 29, 1992

/s/

Edward A. Infante
United States Magistrate
Judge

Supreme Court, U.S.
FILED
JUN 2 1995
Office of the Clerk

No. 94-1815

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

DOUGLAS MILLER,

Petitioner,

VS.

COUNTY OF SANTA CRUZ, SHERIFF AL NOREN, OFFICER MARILYN WEAVER, OFFICER TERRY MOORE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a plaintiff who initiates administrative adjudication of a claim, but fails to avail himself of the right to judicial review of that administrative adjudication, is precluded from filing a collateral action in federal court under 42 U.S.C. § 1983.

2. Whether the ruling of an administrative tribunal composed of nonlawyers but subject to de novo judicial review of all issues of fact and law is entitled to preclusive effect in a collateral action under 42 U.S.C. § 1983.

PARTIES

Respondents County of Santa Cruz ("County"), Sheriff Al Noren, Officer Marilyn Weaver, and Officer Terry Moore were defendants below in an action alleging violations of the civil rights of Petitioner Douglas Miller ("Miller"), plaintiff below. The action was filed in the United States District Court for the Northern District of California.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

Respondents County of Santa Cruz, Sheriff Al Noren, Officer Marilyn Weaver, and Officer Terry Moore submit this brief in opposition to Douglas Miller's Petition for Writ of Certiorari.

STATEMENT OF THE CASE[1]

Petitioner Miller seeks review of the opinion and amended opinion of the United States Court of Appeals for

[1] This Statement is limited to a discussion of the facts relevant to the petition now before the Court and does not attempt a complete description of the trial proceedings below.

the Ninth Circuit affirming the trial court's disposition of Petitioner's action alleging civil rights violations under 42 U.S.C. § 1983.

A. Factual Background

Petitioner Miller was employed as a detention officer by the County of Santa Cruz between 1980 and 1987. (CD 125.)[2] In 1987, the County terminated Miller's employment because he failed to report a salary overpayment. (*Ibid.*) In light of Miller's history of disciplinary problems, the termination was appropriate. (*Ibid.*)

Miller elected to appeal his dismissal to the Santa Cruz County Civil Service Commission ("Commission"). (*Ibid.*) At a full evidentiary hearing, Miller was represented by counsel and permitted to present oral and documentary evidence and to call witnesses. (CD 125; 127, Exhibits 9 and 10.) Following a thorough consideration of Miller's claims and defenses, the Commission issued a written decision upholding the dismissal. (CD 127, Exhibit 9.) Accompanying the decision was a notice to Miller that the time within which judicial review must be sought was governed by California Code of Civil Procedure § 1094.6. (*Ibid.*)

Miller chose to forgo his right to de novo judicial review of the Commission's legal and factual determinations and instead instituted the instant federal court action for alleged civil rights violations under 42 U.S.C. § 1983. (CD 1.)

B. Procedural Background

On June 15, 1992, the County filed the motion for summary judgment arguing that established preclusion principles barred Miller's collateral action under section 1983.

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[2] "CD" refers to the Clerk's Docket sheet, incorporated into Petitioner Miller's Excerpts of Record as Item No. 17 in the appeal of this case in the Ninth Circuit.

(CD 123.) The trial court ruled that under California law Miller's claims were indeed precluded. Miller had an adequate opportunity to present and litigate his claims before the Commission and the right to seek judicial review of the Commission's adverse decision. The court held that Miller's failure to seek such review rendered the Commission's decision final and binding upon the District Court. As such, the court granted summary judgment and dismissed Miller's case. (CD 138, 137.)

Following the denial of a motion for reconsideration, Miller appealed to the Ninth Circuit Court of Appeals.

C. The Court of Appeals Decision

On appeal, the Ninth Circuit affirmed the trial court's ruling that the doctrines of res judicata and collateral estoppel bar Miller's federal suit for civil rights violations under 42 U.S.C. § 1983. (Pet. 11, 33.)[3] Looking to established California rules of preclusion, the court held that under cases like *Swartzendruber v. City of San Diego*, 3 Cal.App.4th 896 (1992), California law accords preclusive effect to issues adjudicated before administrative tribunals where a party declines to pursue appropriate judicial review. (Pet. 17, 38-39.) The Ninth Circuit found that Miller's complaint in federal court merely restated his wrongful termination claims in constitutional terms and thus improperly sought to relitigate an "issue" that had already been adjudicated. (*Ibid.*) Furthermore, the court held that the fact that the administrative decision was rendered by nonlawyers did not alter its preclusive effect. (Pet. 22, 43.) The court found it was sufficient that the Commission's adjudication met the requirements of due process and was subject to de novo judicial review. (Pet. 25, 46.)

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[3] Citations to "Pet. ____" refer to the Petition for Writ of Certiorari filed by Miller, and the accompanying exhibits.

The Ninth Circuit's opinion was originally filed on November 8, 1994, and amended on December 27, 1994. Rehearing was denied on January 5, 1995.

REASONS WHY THE PETITION SHOULD BE DENIED

The holding below is consistent with established Supreme Court decisions, including *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982), and *University of Tennessee v. Elliott*, 478 U.S. 373 (1985), and does not create a conflict among the circuits. Moreover, it promotes administrative efficiency and helps avert redundant litigation in federal court. As such, Miller's petition for writ of certiorari should be denied.

Miller initially chose to litigate his employment dispute before a state administrative tribunal. When that did not go well, he abandoned the established judicial review process and attempted to relitigate the entire matter in federal court under 42 U.S.C. § 1983. Contrary to the main contention of Miller's petition, the decision below precluding this "second bite at the apple" is entirely consistent with the principles affirmed in *Patsy*. As the Court of Appeals noted, it was *Miller's* decision to have the commission adjudicate his complaint. (Pet. 15, 37.) No exhaustion of remedies requirement was ever *imposed* upon Miller. (*Ibid.*)

As for Miller's second issue, there is no conflict between the Third and the Ninth Circuits over the preclusive effect of administrative rulings rendered by nonlawyers. Upon closer examination the discrepancy between the circuits is due primarily to the different facts and constitutional questions at issue in the cases. Indeed, where the facts of the cases coincide, there is no conflict.

A. The Decision Below Is Entirely Consistent With *Patsy*

Patsy v. Board of Regents of the State of Florida reaffirmed the longstanding doctrine that exhaustion of administrative remedies is not required as a prerequisite to bringing a 1983 action. 457 U.S. at 516. The *Patsy* doctrine is, however, inapposite to the instant case. Where, as here, the claimant elects to pursue an administrative remedy, federal courts give preclusive effort to the findings of state administrative tribunals. *Elliott*, 478 U.S. at 380.

As the Court of Appeals concluded, "[n]othing prevented Miller, *prior* to his appeal to the Civil Service Commission, from filing suit in either state or federal court under § 1983." (Pet. 15, 37.) An exhaustion requirement would have compelled Miller to pass through the state administrative procedures before seeking the federal remedy. Miller was under no such constraint. Rather, he elected "to pursue his claim initially in an administrative forum, and to forego the right to seek judicial review in a state court." *Id.* Thus, contrary to Miller's arguments, "*[n]o exhaustion requirement has been imposed on Miller.*" *Id.* (emphasis added).

The decision below was based on well established California rules of claim and issue preclusion and not on a failure to exhaust administrative remedies. This Court held in *Elliott* that "Congress, in enacting the Reconstruction civil rights statutes, did not intend to create an exception to general rules of preclusion." 478 U.S. at 796-97. Consistent with this teaching, the Ninth Circuit has held that federal courts should ordinarily observe state laws of preclusion in 1983 actions. *Plaine v. McCabe*, 797 F.2d 713, 719 n.13 (9th Cir. 1986).[4]

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[4] An exception would arise "where a state court would give preclusive effect to an administrative decision that failed to meet the minimum criteria set down in [*United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966)]." *Plaine*, 797 F.2d at 719 n.13. This is not an

California preclusion law bars all claims that were or could have been litigated in the collateral forum. *California Coastal Commission v. Superior Court (Ham)*, 210 Cal.App.3d 1488, 1499 (1988). In *Swartzendruber v. City of San Diego*, a case directly on point and relied on by the court below, the California Court of Appeal addressed the preclusive effect of failing to seek judicial review of a civil service commission ruling and instead attempting to bring a collateral 1983 action on the same issues. 3 Cal.App.4th at 903. The court held that state preclusion principles make administrative adjudications binding. *Id.* at 908-09.

Under California law, where the claim at issue involves a fundamental right, such as employment, the claimant is entitled to "de novo" judicial review. *McMillen v. Civil Service*, 6 Cal.App.4th 125, 129 (1992). Under this rule the trial court in a 1094.5 proceeding reweighs the evidence and redecides the issues. *Dickey v. Retirement Board*, 16 Cal.3d 745, 751 (1976). Following that review, the claimant has a right of "appeal" to the California Court of Appeal. This right of "de novo" review existed for Miller and for the claimant in *Swartzendruber*.

Miller, like Swartzendruber, failed to pursue such relief and instead sought to file duplicative relitigation of the same "primary right"—i.e., the "right to continued employment" —in a collateral 1983 action. *See Swartzendruber*, 3 Cal.App.4th at 908-09 (discussing California's primary rights doctrine).[5]

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issue in the present case because California has adopted the *Utah Construction* standard. *Id.*

[5] In *Plaine v. McCabe*, the court held that the fact an administrative decision is unreviewed does not diminish the preclusive effect of the decision because state court review *was in fact available* via California Code of Civil Procedure § 1094.5 but purposefully not pursued. The court held that "[i]f an adequate opportunity for review is available, a losing party cannot obstruct the preclusive use of the state administra-

Following *Swartzendruber*, the court below held that under California law the primary right of Miller's claims was (or should have been) addressed in the case *he elected* to bring before the Civil Service Commission, and therefore a collateral attack against defendants in federal court under 1983 is precluded. Exhaustion of administrative remedies was never at issue. The court's holding flows from a straightforward application of well established California preclusion—not exhaustion—doctrines. There is no conflict whatsoever with *Patsy*.

B. The Differences Between *Edmundson* and *Miller* Are Due Principally to the Different Facts and Claims at Issue

Miller attempts to construct a serious conflict between the circuits by noting that the Third Circuit in *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3rd Cir. 1993), refused to accord preclusive effect to the conclusions of lay persons on a civil service commission. Miller maintains this directly conflicts with the decision below. (Pet. 5.) Yet the apparent conflict fades when the facts and claims of the two cases are closely examined.

Edmundson involves a factually and procedurally convoluted situation, but to the extent its facts coincide with those of this case, the two decisions reach essentially the same conclusion. Much like the court below, the *Edmundson* court held that plaintiff's claim under section 1983 against the Pennsylvania Unemployment Compensation Board of Review was barred by claim preclusion because he had failed to raise it either in the administrative hearing or the subsequent judicial review. "Because plaintiff could have but did not raise the First Amendment defense . . . and did not preserve it for federal court adjudication [citation omit-

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tive decision simply by foregoing [the] right to appeal." 797 F.2d at 719 n.12.

ted], he is precluded from asserting that ground in the present case." *Id.* at 191. Thus the decision below and *Edmundson* are in agreement on the facts of this case: A complete failure to raise constitutional issues under section 1983 in administrative and subsequent judicial proceedings results in *claim preclusion.*

Miller clings to that part of *Edmundson* where the Third Circuit refused to accord preclusive effect to the failed efforts of a civil service commission to properly analyze the First Amendment implications of two disciplinary actions.[6] In each situation the commission had attempted to address the intricate legal issues implicated by the First Amendment, but had been unable to do so competently. In light of this, the court held that *issue* preclusion could not arise in a subsequent 1983 action because "an administrative agency consisting of lay persons [does not have] the expertise to issue binding pronouncements in the area of federal constitutional law." *Edmundson*, 4 F.3d at 193. Such a question is not raised in the instant case.

Edmundson does not create the conflict Miller suggests. The decision in *Miller* rests principally on *claim* preclusion grounds. Miller could have raised his 1983 claim before the Commission and then before the superior court in mandamus review but did not, and so was precluded from proceeding in federal court. On this point there is no conflict between the cases. *Edmundson* likewise found claim preclusion under similar circumstances.

What distinctions exist are due primarily to a federal constitutional law question raised in *Edmundson* which is

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[6] Edmundson was disciplined twice. The first time he was suspended; the second terminated. Both times he went before the civil service commission claiming his First Amendment rights had been violated, but each time the commission ruled against him. And both times he abandoned his appeal to a judicial tribunal.

not raised in *Miller*. The *Edmundson* court held that issue preclusion could not arise *on the First Amendment issue* because the commission was incompetent to conduct the intricate First Amendment analysis required by cases such as *Connick v. Myers*, 461 U.S. 138, 142 (1983). *Edmundson*, 4 F.3d at 192-93 ("We see a profound difference in the ability of a Commission composed of lay citizens to resolve matters of credibility and fact . . . and the ability to determine the more complex question of whether the statements are constitutionally protected" under applicable First Amendment standards.). By contrast, in the present action there has never been the suggestion that the members of the Commission were professionally or intellectually incompetent to render factual findings on whether Miller was discriminated against or denied the process generally due public employees. These questions are mostly matters of fact requiring no heightened legal analysis.

Collateral estoppel is proper in this case because the primary issues (discrimination, improper termination procedures, etc.) are well within the competence of civil service commissions. (In addition, the procedure provides for review by a judge under a de novo standard in a mandamus proceeding to correct any errors in resolving such issues.) Thus the discrepancies between the two cases are best viewed as different resolutions to different cases, hardly the magnitude of conflict meriting this Court's review.

C. A Contrary Decision Would Swamp the Federal Courts with Duplicative Public Employment Disputes

Miller's view that preclusion principles should not apply to this case would turn the federal courts into super civil service commissions. Under Miller's rationale, every claimant will always appeal an employment dispute to a civil service commission and then, if unsuccessful, file a subsequent 1983 action on the same primary right in federal court. Without proper adherence to well established preclu-

sion principles, the federal courts will be flooded with disgruntled public employees attempting to refight their employment battles under the convenient guise of 1983 civil rights claims.

By his own choice, Miller took advantage of the expedited and relatively inexpensive grievance mechanisms provided by the Civil Service Commission but then failed to avail himself of the right to judicial review. The important policies of administrative and judicial efficiency which lie at the heart of preclusion law militate against allowing Miller to litigate anew his complaints in federal court.

CONCLUSION

Miller chose to litigate his employment dispute before the Civil Service Commission of the County of Santa Cruz and lost. Now, having neglected to comply with state judicial review procedures, Miller seeks to relitigate the entire matter in federal court under the aegis of 42 U.S.C. § 1983. The district court and the court below properly denied him that chance on the ground that well established preclusion doctrines bar such duplicative litigation. Miller could have raised the 1983 issues before the Commission and the superior court in a mandamus proceeding, but did not. State preclusion law, which courts are obliged to apply in these matters, now bars him from doing so in a collateral forum.

Miller's suggestion that such elemental preclusion principles somehow violate this Court's holding in *Patsy* is without merit. Miller selected his forum; no exhaustion requirement was imposed upon him. The ruling below merely holds him to his decision.

Nor can Miller conjure a serious circuit conflict meriting this Court's attention out of de minimis differences in two legally and factually different cases. In the present case there is no question that the forums available to Miller could

have competently and conclusively resolved all his grievances. He merely chose not to use them.

Miller's petition for writ of certiorari should be denied.

Respectfully submitted,

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